BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

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12-05-01

Appeal of Zoning Administrator's Decision Allowing the Location of Father Flanagan's Boys Town Phase I, a Residential Group Home at premises 1308, 1310, 1312 and 1314 Potomac Ave., S.E. (Square 1045, Lots 134, 136, 137, 138).	) BZA No. 16791

APPELLANT SOUTHEAST CITIZENS FOR SMART DEVELOPMENT, INC.'S OPPOSITION TO FATHER FLANAGAN'S BOYS HOME MOTION TO STRIKE

On November 29, 2001, Father Flanagan's Boys Home, Owner ("Boys Home") filed a motion to strike certain exhibits submitted by Appellant Southeast Citizens for Smart Development, Inc. ("Citizens") in support of the above-captioned appeal, as well as to suppress related testimony at the December 4, 2001, hearing. Specifically, Boys Home has moved to strike a number of exhibits (Exhibits 3, 4, 5, 6, 7, 8, and 10) and suppress all testimony that, in its view, is not "germane to the Appeal." In particular, Boys Homes has moved to strike and evidence and testimony going to the "central operations" between the four clustered living units and "future plans" (i.e, Phase 2) of the project. Boys Home Motion to Strike, at 2. Citizens opposes this motion.

Boys Home provides no explanation of why any of the identified exhibits or subject areas or not "germane" to the issues in this appeal. However, it appears that this evidentiary objection flows from Boys Homes' own view of the merits of this appeal, articulated in its pre-hearing response, that the Zoning Administrator may not look beyond the building lot lines to examine whether what is a single project encompassing several building lots that as a whole exceeds

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EXHIBIT NO.37A

the occupancy limits for matter of right development.[1] Thus, under this view, the Zoning Administrator may not even consider the Owners' own submission to permitting officials which describe the four clustered living units as being collectively part of the Boys and Girls Town "Pennsylvania Avenue campus." See, e.g., Exhibit 8 (May 10, 2001 submission by Esocoff & Associates). Citizens, obviously, disagrees with this view.[2]

However, the question of whether the Zoning Administrator is lawfully permitted (and indeed required, as Citizens contends), to consider fact demonstrating that Boys Home is operating a single CBRF for 24 persons on several adjoining lots, is the ultimate issue to be decided in this appeal; this is the issue that this Board must decide after the close of the hearing record, and after consideration of all legal arguments and evidence.[3] If Citizens is correct in its

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[1] Specifically, Boys Home contends that the Zoning Administrator is legally precluded from evaluating a project that occupies several lots as a single facility by virtue of the principle that zoning decisions should not "personal" to the owner but must "run with the land." See Response of Father Flanagan's Boys Home, Owner, at 5.

[2] As will be discussed in more detail in Citizens' closing arguments and proposed findings of fact and conclusions filed after the hearing, the cases cited by Boys Home do not support the proposition that the Zoning Administrator's review is confined to building lot lines. Rather, these cases simply stand for the principle that this Board cannot impose variance or special exception conditions that are applicable only to the specific property owner appearing before it; instead, such conditions must "run with the land," and therefore apply to any other similarly situated owner who may subsequently acquire the property. See National Black Child Development Institute, Inc. v. D.C. Board of Zoning Adjustment, 483 A.2d 687 (D.C. 1984) (conditions limiting the use of the variance to the current owner of the property and providing that the variance terminates upon transfer the property was an unlawful personal conditions) Nothing even remotely similar would occur if the Zoning Administrator viewed the four proposed building as a single Community Based Residential Facility ("CBRF"), which in fact it is. Such a determination would run with the land and be equally applicable to any similarly-situated future operator of the facility. Indeed, there is ample precedent in the zoning regulations for considering a project that is spread out over several adjoining lots to be a single facility, college campus' coming immediately to mind.

[3] It is also worth noting that this question is an unresolved issue of zoning policy that important policy implications beyond this appeal. Resolution of this question will decide whether other land owners will have available a mechanism for evading the occupancy limitations placed by the zoning regulations on certain facilities by simply subdividing an area into several lots of record so that each lot considered in insolation of the whole.

view that the Zoning Administrator has the authority and indeed, the obligation to consider information showing that the four clustered living units are part of a single facility, the evidence that Citizens seek to present at the hearing concerning the central management of the four clustered living arrangements. This information, in turn, is germane to whether, in fact, the four living units are in reality a single CBRF for more than 24 persons, with all the attendant impacts on the surrounding community of a facility of that size, which under the Zoning Regulations, cannot proceed without approval by this Board.

It is therefore not appropriate to exclude evidence from the record as a preliminary matter, based on one parties' proffered legal theory of the merits of the case, prior to consideration of all the testimony and the proposed findings of fact and conclusions of law to be submitted by the parties. Because this is the ultimate question before this Board, this issue cannot and should not be decided in advance of the hearing as an evidentiary matter. Such an evidentiary ruling would effectively decide the merits of the case in Boys Home's favor, and deprive Citizens of a meaningful opportunity to make their case at the hearing.

Most importantly, allowing Citizens to present testimony and evidence on this issue would serve the interests of efficiency and economy. If this Board ultimately agrees with Boys Home's theory of the case, Board can simply accord this material very little weight to this testimony. By contrast, if this Board ultimately agrees with Citizens on this issue, excluding this information now will result in a situation where the record will exclude evidence ultimately determined to be directly relevant to the key issue on appeal, requiring a time-consuming new hearing to allow Citizens to submit this information.

Even taking a narrow view of this evidentiary question, the specific facts about the

proposed facility offered by Citizens are germane to this appeal because they relate to issues about which the applicable zoning regulations are directly concerned. For example, as noted above, Citizens has submitted or intends to present testimony of a factual nature showing that the Boys Home facility is in fact a single CBRF for 24 residents each of which is subject to a single unified management, and not, as the Zoning Administrator asserts, four wholly separate, autonomous CBRFs. Information relevant to the size of Boys Home's proposed facility would not be germane to the zoning regulations applicable to CBRFs only if the classification of CBRFs as matter of right under applicable regulations did *not* depend on the number of persons residing in the CBRF. However, under the applicable regulations, the size of a CBRF is obviously germane to whether or not a CBRF is matter of right in the C-2 zone.[4] For precisely that reason, the Zoning Administrator's ruling now under appeal was based on a judgment concerning the size of the facilities at issue.

Thus, all exhibits or testimony pertaining to the number of residents that will occupy a CBRF in a C-2-B zone are plainly "germane" to the Zoning Administrator's determination here. Many of the exhibits or testimony that Boys Home seeks to exclude pertain to the size of the Boys Home CBRF. For example, Citizens has submitted material attached to Exhibit 8, consisting of documents related to the review by D.C. permitting officials of the facility's environmental impacts, demonstrating that both Boys Home and D.C. permitting officials considered and evaluated the proposed facility as "Phase 1" of Boys Home's "Pennsylvania

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[4] Section 732.1(a) of the zoning regulations plainly states that the following CBRFs are permitted in the C-2 zone only by permission of the Board of Zoning Adjustment: "Youth residential care home or community residence facility for sixteen (16) to twenty-five (25) persons, . . ." 11 DCMR § 732.1(a).

Avenue *Campus*" comprised of four residences, and not, as the Zoning Administrator stated, four separate CBRFs each housing only six children. See, e.g., Exhibit 8 (May 10, 2001 submission by Esocoff & Associates) (emphasis added). Boys Home's own characterization of this project as being a single "campus," and referring to the four clustered living units collectively as "Phase 1" therefore pertains to the factual question of the size of the Boys Home facility, and is germane to the issues in this appeal.

Citizens also intends to introduce expert testimony by Pat Harden, a licensed social worker and psychotherapist who is familiar with the different models for operating group homes, ranging from small, independently run CBRFs to larger group homes with clustered living arrangements. Based on her familiarity with group homes, some of which are laid out in manner similar to Boys Homes' proposed facility, Ms. Harden will describe the operational differences between small CBRF's that are located matter of right, and larger CBRF's that are only permitted by permission of the BZA. Ms. Harden will also explain why she believes, based on the lay-out of facility and other publicly available material, that Boys Home intends to operate its Capitol Hill Campus as a single unified facility, and why such a facility has different operational and programmatic characteristics than four independently operated, stand-alone CBRFs. As a result of these unified operations, the Boys Home facility will have all the attendant impacts on the surrounding neighborhood of a CBRF for 24 residents, notwithstanding the fact that the occupants sleep in a cluster of separate living units.

Boys Home would apparently seek to exclude Ms. Harden's testimony, since its motion to strike also seeks to "suppress" any testimony showing the "central operations" of Boys Home. However, Ms. Harden's testimony relates directly whether this is in fact a single CBRF for 24

residents, and not, as the Zoning Administrator asserts, four wholly separate CBRFs. Since this testimony is an important factual predicate to determining the size of the proposed CBRF, it is therefore plainly germane to the Zoning Administrator's ruling

Boys Home also seeks to exclude material contained in Exhibit 3 about the location of pre-existing CBRF's within 500 feet of the proposed Boys Home facility. However, this information too is plainly germane to the zoning regulations being applied by the Zoning Administrator. Specifically, Section 725.1 of the Zoning Regulations, which the Zoning Administrator cites in his determination, states that review by this Board is required where a youth residential care home of seven (7) to fifteen (15) persons is located in the same square or within 500 feet of an existing community-based residential facility for seven (7) or more persons. 11 DCMR § 725.1. Thus, information provided showing the location of pre-existing CBRF's, in conjunction with information about the size of the facility, is germane to whether Boys Home's proposed CBRF is matter of right or subject to review by this Board.

ZA cites 721.5

The objections of Boys Home to the admissibility of the other specified exhibits are equally without support. For example, Exhibit 3 provides information about the Ward 6 planning efforts. Planning documents such as the Ward 6 Comprehensive Plan are of obvious relevance to any interpretation of the Zoning Regulations, since the zoning regulations implement the goals and directives of the comprehensive plan. This is particularly true where the applicability of the regulations is less than clear. That is the case here, since the text of the zoning regulations does not specifically address whether a project operator can evade applicable numerical occupancy limits for matter of right development by the simple expediency of spreading the development over a serious of adjoining lots (forcing Boys Town to rely on very general articulations of

common law principles such as the fact zoning cannot be "personal" to justify a zoning view of the project that is counter to the reality of its operations and attendant impacts).

Exhibits 4 and 5 include material relating to the existing Boys Home's CBRF facility on Sargent Road, N.E., including material related to this Board's special exception review of the Sargent Road facility. The objections to this Exhibit asserted by Boys Home is ironic, in view of the fact that Boys Home's own Response to Citizens' pre-hearing submission both refers to and includes material relating to the existing Boys Home's CBRF facility on Sargent Road, N.E.. See Response, Exhibit J.

Likewise, Boys Home's attempt to strike Exhibit 10 from the record, which consists of the federal lawsuit brought under the Fair Housing Act filed by Boys Home against individual members of Southeast Citizens for Smart Development, and a letter indicating that Boys Home had not yet sought to utilize the District's mechanism for seeking a "reasonable accommodation" from government regulation under the Fair Housing Act, is contradicted by Boys Home's own Response, which includes a consent decree between the District of Columbia and the U.S. Department of Justice under the Fair Housing Act (Exhibit F), as well as repeated references to the Fair Housing Act. One might well ask why Boys Home seeks to exclude reference to its own lawsuit seeking money damages under the Fair Housing Act from the District of Columbia and private citizens who are officers of a nonprofit community group concerning the same property that is the subject matter of this appeal, while at the same time, in its own pre-hearing filing, repeatedly invoke the Fair Housing Act and even include a litigation pleading that is part of a Fair Housing Act lawsuit brought by unrelated parties that is unrelated to the permits at issue here.

Finally, Boys Home seeks to strike virtually every aspect of Citizens' pre-hearing

submission other than the building permit applications themselves, and muzzle witnesses from mentioning a lengthy list of forbidden topics, including impacts on the neighborhood, future phases of development, and "impacts on zoning and planning goals." Citizens request that this very vague and ill-defined motion to suppress be denied. Circumscribing in advance the precise words or statements used by Citizens' witnesses will unduly interfere with the orderly presentation of Citizens' case. Such a ruling invites repeated interruptions of testimony in order to allow counsel to argue whether specific statements fall within the large but vaguely articulated ambit of forbidden topics. As a result, Citizens' witnesses will be hampered in their ability to express their views in the manner they see fit, and Citizens' overall presentation time will be greatly prolonged.

For example, the applicable Zoning Regulations require BZA review over large CBRFs in order to protect the surrounding community from the impacts of large CBRFs. Citizens understands that the exact magnitude and nature of those impacts as not at issue in this appeal whose focus is on the threshold issue of whether this CBRF is, in fact, a large CBRF. However, it is difficult to purge from any discussion of the size of this CBRF the corollary that the four residential living units will result in community impacts that are identical to the impacts of those CBRFs for which BZA oversight is contemplated by the Zoning Regulations. Indeed, the difficulty of purging all the forbidden references is illustrated by Boys Homes' own narrative description of the project provided to enable D.C. permitting officials to evaluate the environmental impacts of the building permits at issue here, which implement "Phase 1" of the Boys Home Capitol Hill campus. These descriptive documents provided by Boys Home include repeated references to "Phase 2" of the Boys Home project.

In sum, the objections mounted by Boys Home in its motion to strike relate to the weight that should be accorded to this material by the Board rather than its admissibility. Granting such a motion only invites repeated interruptions and lengthy argument over evidentiary issues by legal counsel over the course of the hearing that will unnecessarily prolong Citizens' case, which, if allowed to proceed without repeated evidentiary objections, will be brief. In the interests of time, Citizens intends to present only six witnesses at the hearing: Mr. Wilbert Hill, Ms. Pat Harden, Mr. Kirk White, Mr. Rob Nevitt, Mr. Brian Furness, and Ms. Ellen Opper-Weiner. With the exception of Citizens' two expert witnesses, Ms. Harden and Mr. White, these witnesses will confine their presentations to brief introductory or summary statements of no more than five minutes each. Accordingly, there is no occasion for motions to suppress testimony or exhibits.

Respectfully submitted,



Andrea C. Ferster
1100 17th Street, N.W. 10th Fl.
Washington, D.C. 20036
(202) 974-5142

Counsel for Southeast Citizens for Smart Development, Inc.

December 4, 2001

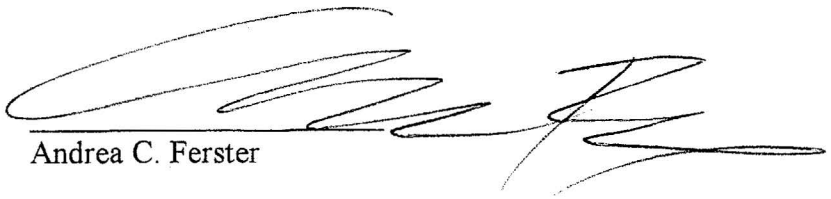
CERTIFICATE OF SERVICE

I hereby certify that, on December 4, 2001, a copy of the foregoing Opposition to Motion to Strike was served by hand delivery, on:

Kenan Jarboe, Chair
ANC 6B
921 Pennsylvania Ave., S.E.
Washington, D.C. 20003

Marie-Claire Brown,
Assistant D.C. Corporation Counsel
441 4th Street, N.W. Room 600 South
Washington, D.C. 20001

Phil Feola
ShawPittman
2300 N Street, N.W.
Washington, D.C. 20037-1128



Andrea C. Ferster